Supreme Court, U.S.
FILED
081313 APR 22 2009
OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT of the UNITED STATES

JOE C. WATERMAN, *Petitioner*
vs.
NATIONWIDE MUTUAL INSURANCE COMPANY
and ALLIED INSURANCE COMPANY, *Respondents*

On Petition For A Writ Of Certiorari To The
Supreme Court of the State of Idaho

PETITION FOR A WRIT OF CERTIORARI

Lawrence E. Kirkendall,
Counsel of Record
KIRKENDALL LAW OFFICE, CHTD.
2995 North Cole Road, Suite 260
Boise, Idaho 83704
Telephone: (208) 345-5262

QUESTIONS PRESENTED

Is the jury verdict in favor of Petitioner supported by substantial evidence?

PARTIES TO THE PROCEEDINGS

1. Petitioner, Joe C. Waterman, and individual, was the Plaintiff/Appellant below
2. Nationwide Mutual Insurance Company and Allied Insurance Company were the Defendant/Respondents below.

TABLE OF CONTENTS

Page

Questions Presented i
Parties to the Proceedings ii
Opinions Below vi
Jurisdiction vi
Statutory and regulatory provisions involved vii
Statement of Case 1
Reasons for Granting the Petition 18
Discussion 20
Impermissible Burden of Proof 24
Constructive Discharge 27
Proof of Discrimination 33
Willful 34
Appendix A 37
Appendix B 51
Appendix C 62
Appendix D 64

TABLE OF AUTHORITIES

CASES

Air Line Pilots Associated, International v. Trans World Airlines, Inc.,
13 F.2d 940, 956 (2nd Cir. 1983) 34
Auguster v. Vermilion Parish School Board,
249 F.3d 400 (5th Circuit 2001) 23
Balderston v. Fairbanks Morse Engine,
328 F.3d 309, 322 (7th Cir 2003) 20
Brewer v. Quaker State Oil Refining Corp.,
72 F.3d 326, 333 (3rd Cir. 1995) 32
Carter v. Decisionone Corp.,
122 F.3d 997 (11th Cir. 1997) 19
Chapman v. A1 Transport,
229 F.3d 1012 (11th Circuit 2000) 23, 31

Fuentes v. Perski,
32F.3d 759 (3rd Circuit 1994) 23
Greene v. Safeway Stores, Inc.,
98 F.3d 554, 559 (10th Cir. 1996).....19
Gunter v. Murphy's Lounge, LLC,
114 Idaho 16, 27, 105 P.3d 676, 687 (2005) 1
Hartley v. Wisconsin Bell, Inc.,
124 F.3d 887, 892 (7th Cir. 1997).....19
Hazen Paper Company v. Biggins
507 U.S. 604, 609 (1993).....23, 35
McDonnell Douglas v. Green,
411 U.S. 792 (1973).....18, 19, 20, 21, 27
Miller v. Eby Realty Group, LLC,
396 F.3d 1105, 1111 (10th Circuit 2005) 22
Morgan v. A.G. Edwards & Sons, Inc.,
486 F.3d 1034 (8th Cor. 2007) 19
Olson v. Marshall and Ilsley Corp.,
267 F.3d 597 (7th Circuit 2001).....23
Pennsylvania State Police v. Suders
542 U.S. 129 28
Peterson v. Hewlett Packard Company,
358 F.3d 599, 603 (9th Circuit 2004).....24
Quaratino v. Tiffany & Co.,
71 F.3d 58, 65 (2nd Cr. 1995).....21
Reeves v. Sanderson Plumbing Products Company, Inc. 530 U.S. 133 (2000).....21, 23
Rivera-Rodriguez v. Frito Lay Snacks Caribbean,
265 F.3d 15, 23 (1st Cir 2001) 19
Schlitz v. Burlington Northern Railroad,
115 F.3d 1407, 1413 (8th Cir. 1997).....19
Slattery v. Swiss Reinsurance American Corp.,
248 F.3d 87, 91)2nd Cir. 2001) 28
St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993).....21, 22
Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981).....21, 22

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111, 126 (1985) 34
Troupe v. May Department Stores, Inc.,
F.3d 734 (7th Cir. 1994) 26
United States v. Arvizu, 534 U.S. 266 (2002) 26
Wallace v. J.R. Simplot Company,
26 F.3d 885, 891 (9th Circuit 1994) 24
Waterhouse v. Hopkins, 490 U.S. at 271 20
West v. Nabors Drilling USA, Inc.,
330 F.3d 379, 391 (5th Cir. 2003) 35
Woroski v. Nashaua Corp.,
31 F.3d 105, 109, n.2 (2nd Circuit 1994) 31

STATUTES AND REGULATIONS

29 U.S.C. § 623.(a) 65
29 U.S.C. § 626(b)(c) 65

OPINIONS BELOW

1. The jury verdict returned by the jury, awarding the petitioner $700,000.00, and finding the discrimination "willful" is reproduced in the Appendix at page 63.
2. The district court's (trial court's) written decision granting the Defendant/Respondent's Motion for a Directed Verdict is reproduced in the Appendix at page 52.
3. The opinion issued by the Supreme Court of the State of Idaho on January 22, 2009, is reported as Waterman v. Nationwide Mutual Insurance Company. 09.3 ISCR 68, _____ Idaho _____, _____ P.3d _____ (2009) and is reproduced in the Appendix at page 38.

JURISDICTION

This petition seeks review of an opinion issued by the Supreme Court of the State of Idaho on January 22, 2009.

Jurisdiction in this Court exists under 28 U.S.C. § 1257(a) which provides as follows:
28 U.S.C. § 1257. State courts; certiorari
(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question...or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This Petition involves the Age Discrimination in Employment Act of 1967:

1. 29 U.S.C. § 623(a) is reproduced in the Appendix at page 65.
2. 29 U.S.C. § 626(b) is reproduced in the Appendix at page 65.

STATEMENT OF CASE

Joe Waterman [Waterman] brought an action against his former employer, Nationwide Mutual Insurance Company and Allied Insurance Company [Nationwide/Allied]. Although Waterman initially filed several causes of action, the case proceeded to trial only on Nationwide/Allied's alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA). After the jury returned a verdict in favor of Waterman, awarding him $700,000.00 in damages, and finding the discrimination was 'willful', the trial court granted Nationwide/Allied's motion for directed verdict. Waterman then appealed the action to the Supreme Court of the State of Idaho seeking to reverse the trial court's directed verdict ruling and to reinstate the jury verdict in his favor. The Supreme Court of the State of Idaho upheld the trial court's grant of directed verdict on January 22, 2009, and Waterman has thereafter brought this petition.

The standard of review in reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict, the appellate court applies the same standard as that applied by the trial court when originally ruling on the motion. *Gunter v. Murphy's Lounge, LLC*, 114 Idaho 16, 27, 105 P.3d 676, 687 (2005) (citation omitted). The appellant conducts an independent review of the evidence and does not defer to the trial court's findings. *Id.* The appellate must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorable to the opposing party, there exists substantial evidence to justify submitting the case to the jury. *Id.* The substantial evidence test does not require the evidence be uncontradicted. *Id.* It

requires only that the evidence be of sufficient quality and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper. *Id.*

The following facts, although not all the facts in evidence, and in a light favorable to Petitioner, are as follows:

Nationwide Mutual Insurance Company [hereafter "NW"] acquired Allied Insurance Company [hereafter "Allied"] in 1998. In the spring of 2000, NW made the decision to integrate the western NW claims region into the existing Allied claims model.

The Allied claims model utilized completely different computer program, policies and procedures. Moreover, Allied understood that it had a formidable task ahead training any NW "associate" who was selected to remain under the Allied model following the integration, and had developed a comprehensive training schedule.

The integration was to be implemented on January 1, 2001, with all claims made after that date, whether NW or Allied, to be handled under the Allied model on Allied systems. To resolve NW claims already ongoing in the NW system at the time of implementation, rather than to train Allied adjusters on the soon to be retired NW system, Allied made the decision to retain at least one employee familiar with NW systems in each region to handle the pending NW claims to conclusion. Therefore, under Allied's integration plan, it became a necessity to retain at least one NW adjuster in each of Allied's western regions.

Although both models called for two field adjusters to be located in Boise, Idaho, the existing NW claims model differed significantly from the new Allied claims model.

Under the NW model, the regional claims office handled the largely clerical but labor intensive auto medical pay claims, and small bodily injury claims, freeing the field adjuster to handle only the larger more complex claims. Moreover, for the eight years preceding integration, the tasks were split between the two Boise field adjusters; one adjuster handled property damage claims only, including homeowner policy loss and auto damage; with the other field adjuster exclusively handling only the auto personal injury and liability claims. Under the NW model, the policy holder would bring his damaged auto to the NW office for the damage appraisal.

Under the new Allied model, on the other hand, the two field adjusters would no longer have an office, and were expected to work from their own home. The auto med pay claims and smaller personal injury claims, which were handled by the regional office under the NW plan, were expected to be handled by the adjusters in the field. The two field adjusters were to be "multiline adjusters", and were expected to handle both property and liability losses. And, rather than the policy holder bringing the damaged auto to the office for damage appraisal, the adjuster was required to travel to the customer.

After the announcement of the intended integration, Allied made available online a periodical entitled "Up to Date" to provide both NW and Allied associates with information regarding the upcoming changes which were to occur at the time of integration. When the integration was announced, Joe Waterman [hereafter "Waterman"] (age 49) and Scott McLeish [hereinafter "McLeish"] (age 36) were the two Idaho NW field adjusters located in Boise. Waterman was the property damage adjuster, and

McLeish was the liability adjuster. In July of 2000, five months prior to the integration, Allied posted an opening for a position for a multiline adjuster to be located in Boise. McLeish, fearing that one of them may lose their job, applied for and was hired for the position by Allied in August of 2000. McLeish, already familiar with the existing NW systems, and, with the opportunity to gain five months experience adjusting Allied claims prior to the integration date, was in an ideal position to have assisted Allied at the time of integration in both wrapping up the pending NW claims and to proficiently handle the new post-integration Allied claims.

The Allied chief executive officer in charge of the integration was Mike Lex [hereinafter "Lex"] (age 35). Kelly Schilling [hereinafter "Schilling"], who worked with and reported directly to Lex, was in charge of the actual implementation of the plan. Each western region had a claims supervisor (claims director) who reported to Lex and, under each supervisor, was a claims manager, who would directly manage the field adjusters. In Idaho, following the integration, the remote field adjusters in Boise would report to Roy Thomas [hereinafter "Thomas"] (age 34), claims manager, who would report to Jeff Miller [hereinafter "Miller], the claims supervisor, who, in return, would report directly to Lex.

When McLeish left for Allied in August of 2000, Waterman was NW's only remaining adjuster in Idaho. McLeish began to immediately struggle with his new Allied position, and was soon in the midst of a disciplinary procedure that would ultimately result in his dismissal by Allied. By the integration date of January 1, 2001, the disciplinary process had proceeded to the point where McLeish,

although still employed, was no longer receiving claims from Allied, and was eventually discharged by Allied in February.

By October of 2000, Waterman still did not know his employment status within the upcoming integration. The "Up to Date" periodical had informed all Allied and NW associates that the NW adjusters who were to be retained under the model would be contacted on September 27, 2000. On September 27, 2000, they were to be advised of their new positions and responsibilities by their new claims supervisor, and were to be provided with additional information regarding Allied's policies and procedures expectations. On September 27, Waterman was not contacted.

On October 3, 2000, Waterman received a telephone call from Thomas who was in Boise to address McLeish's escalating disciplinary situation, and Waterman was advised by Thomas that Thomas was going to be his "new boss". The two met that day for a 45 minute lunch at a local restaurant and their conversation consisted of mostly getting acquainted and exchanging amenities. Waterman learned for the first time that his position of property damage only adjuster was being eliminated, and that he was to be retained by Allied as a multiline adjuster. The position and responsibilities of the position were not explained to him, nor was there any discussion, formal or otherwise, regarding Allied's claims policies and procedures. Waterman left the meeting without any paperwork at all. Despite the informal nature of the 45 minute lunch meeting which took place between Waterman and Thomas on October 3, later, Allied, in defending its position that Waterman was adequately trained to handle his job position at

the time if integration, listed this October 3 meeting as "one-on-one training by Roy Thomas".

Later, it became clear that Thomas had assumed that Waterman had been contacted and provided the information prior to his October 3 meeting, for, in a recorded telephone conversation which occurred on May 3, 2001, between Waterman, Thomas, and Miller, Thomas expressed surprise that Waterman had not been contacted prior to the meeting nor had been provided with the information and details as anticipated by Allied's integration team.

Following the October meeting with Thomas, a great deal of Waterman's work time was consumed in closing the existing NW office, making room at his home for a home office, moving and setting up the NW equipment necessary to adjust NW claims on the NW system, and setting up the new Allied equipment for adjusting claims on the Allied systems. Until January 1, 2001, Waterman continued to be responsible to adjust his claim load of both the new and pending NW claims.

In November, prior to the integration, meetings were held in Denver to acquaint the new associates with the Allied departments and people. Although, at these meetings, there was some overview provided regarding policies and procedures, there was no formal classroom training, and there was no comprehensive training provided on how to navigate Allied's computer systems. Again, despite the informal nature of these meetings, Allied, when listing Waterman's training, later characterized the meetings in Denver as training on "Allied systems, procedures and rating issues", and would extend the time spent in training to include two days of travel as training days, in an obvious attempt to portray

the November, 2000 meeting in Denver as more extensive training than what actually occurred.

On November 20 through the 22nd of 2000, Waterman received his first formal training on a computer program utilized to adjust auto damage claims under the Allied systems in Salt Lake City. Waterman quickly learned and became proficient on the program, and experienced no difficulties with the new system in adjusting the auto damage claims. This is the extent of formal training received by Waterman prior to the integration of January 1, 2001.

On January 1, 2001, the "roll-out" for the date of implementation of the integration, in addition to the 54 pending NW claims, Waterman began to receive Allied and NW claims which he was to adjust on the new Allied systems, and immediately began to experience problems. Remote and isolated, Waterman was not only the sole adjuster in Boise, but was also the only adjuster for Allied in the entire state of Idaho. Under the Allied model, Allied was to have additional field adjusters in both Pocatello and Twin Falls, Idaho, and, at the time of integration, in addition to the second Boise position, all three of those positions remained unstaffed.

With the implementation of Allied's systems, Waterman experienced a string of petty annoyances, which, when compounded, deprived Waterman of valuable time that could have been spent adjusting claims. The NW system and the Allied system were so incompatible that the two systems could not be run on the same computer, and Waterman needed to be provided a second computer to adjust the Allied claims. To switch from NW claims to Allied claims, Waterman had to shut down the NW computer, crawl under his desk, physically unplug one

computer, plug in the other computer, and reboot. Moreover, given Waterman's rural location in Idaho, Waterman did not have access to a DSL line, and had to utilize slow dial-up access. Thomas and Allied attempted to obtain a DSL line for Waterman, given his rural location, but was unsuccessful; thus, Allied was clearly aware of how this impeded Waterman's ability to efficiently handle the new claims. As the sole adjuster for Allied in Idaho, a significant amount of additional time was spent away from his desk traveling to the policy holder to make auto damage appraisals under Allied's model. As the sole isolated field adjuster for Allied in the state of Idaho, there were no seasoned Allied adjusters available for Waterman to turn to for guidance and assistance, and Waterman, without adequate training, struggled to self-teach himself on the new Allied Systems. Waterman, who had been adjusting only property claims for eight years prior to the implementation, had to reacquaint himself with liability and bodily injury claims. Waterman's single biggest obstacle, however, was in adjusting the med pay claims without the benefit of training, which, although easy, involved a substantial amount of time consuming clerical work, keeping Waterman from adjusting his other claims.

Two weeks after the merger, on January 15, 2001, Waterman, for the first time, was introduced Miller, Waterman's new claims supervisor, and Thomas' boss. Miller, who was in Boise as a result of the continuing disciplinary process of McLeish, was at the Boise airport awaiting his flight back to Denver, and Waterman, as requested, traveled to the airport and met with Miller for approximately 15 minutes at the airport lounge. Miller chastised Waterman that, "Roy felt that he was going to be a

problem child" and that Waterman "did not want to be part of the team". Miller further told Waterman that it was, "Allied's philosophy that Nationwide people have an eight-to-five mentality, that Nationwide as a company is too parental, that Nationwide employees are overpaid, and that you (Waterman) need to get on the bus." Taken aback by Miller's hostility, Waterman left the meeting feeling like "he was on an island out there by himself", and that he was being targeted to be "railroaded" out of the company.

Approximately two weeks into the integration, on January 18, 2001, in anticipation that the regional office would provide additional field support, Waterman left a voicemail for Thomas that he was unable to proficiently deal with his burgeoning claim load and needed assistance. And, rather than extend assistance, or to inquire as to the source of Waterman's difficulties, and, rather than talking with Waterman directly on the telephone, Thomas responded with an e-mail. Thomas asserted that at Allied multiline field reps were expected to handle five to seven new claims per week, and although Waterman's claims were at seven per week, on the high end of average expected of [seasoned] Allied adjusters, Waterman was nevertheless expected to be able to handle his claim load. Thomas assumed that Waterman was not working hard or fast enough or that Waterman was unable to organize his time. Thomas went on to list yet additional policies and procedures that Allied expected Waterman to follow on the claims, all of which would be discussed further "when you come to Denver for training".

Allied and NW had a different way of counting claims. NW counted each exposure as a separate claim whereas Allied counted each accident as a

single claim. Under Allied's definition, each claim could have multiple exposures. For example, one of Waterman's claims involved a school bus accident with 30 children in eastern Idaho. This would be 30 claims under NW, but only one claim under Allied's definition. Thomas's reference to 'claims' to Waterman, without listing exposures, therefore, was, for the most part, a meaningless number.

As Waterman continued to experience problems handling the claim load, he continued to seek assistance from Thomas, his only link to Allied, particularly in regard to the med pay claims. In response to his pleas, Thomas, rather than provide assistance, continued to chide Waterman to "work harder, work faster". Shortly after implementation, Waterman requested that Thomas provide him with a switch he saw being utilized by an adjuster when he was at the meetings in Denver which took place in November. Thomas declined to obtain a switch for Waterman as it was "too expensive", and, moreover, once Waterman was through adjusting the pending NW claims, the NW system was to be retired.

Only 30 days into the implementation of the integration, on February 2, 2001, Allied initiated the disciplinary process against Waterman by providing Waterman with a "verbal warning" that his claims compliance was below Allied's expectations. When Waterman received the verbal warning, no consideration was given to the fact that Waterman was not a proficient Allied adjuster, rather, he was a retained NW adjuster who had yet to receive comprehensive training on Allied systems, policies and procedures, or that Waterman was then the sole adjuster in the state of Idaho, when the Allied model for Idaho called for two adjusters in Boise, one adjuster in Twin Falls, and one adjuster in Pocatello;

that Waterman was working claims in an expanded territory, requiring excessive driving to make auto damage appraisal, that Waterman was trying to make adjustments from working in an office to working out of his home; that Waterman's rural location did not allow him to have access to a DSL line to efficiently handle claims; that Waterman had to manually to switch between computers to adjust both NW and Allied claims, and, Waterman's experience for eight years prior to the integration had been in exclusively adjusting property losses, and thus, was inexperienced in handling liability, bodily injury and med pay claims.

At the end of February, on February 26, 2001, Waterman finally received his first formal training on Allied's computer programs, including Colossus, a program used to adjust bodily injury claims. Other NW adjusters had previously received Colossus training in October of 2000, prior to the integration.

On March 6, 2001, upon his return from training on the computer programs, Allied initiated the next step in Waterman's now escalating disciplinary process by providing Waterman with a written warning; Waterman received an "Action Plan for Achieving 90% Compliance" from Thomas, wherein he was to meet 90% compliance by May, 2001. Waterman was still the sole adjuster in Boise, although by late March or April Allied had hired/transferred two adjusters to fill both the Pocatello and Twin Falls slots. Kordon Cray, (age late 20's) an experienced multi-line adjuster, was placed in Pocatello, and Peter Pratkelis (age early thirties) was placed in Twin Falls. Both had extensive training prior to moving out to their locations, and, after they were placed, Waterman was required to continue to handle those areas until

they became comfortable and well trained in their positions. Unlike Waterman, both handled claims only under the Allied systems, and were not required to bounce between two computers, as was Waterman, as only Waterman continued to work on the now dwindling NW claims.

On March 21st, Waterman went to Denver for company meetings and to receive additional training. Following the conclusion of that training, on March 26, Waterman drove to Glenwood Spring to shadow Arnie Dollase [hereinafter "Dollase"], a seasoned Allied adjuster, to assist him to "better organize his time". However, Dollase, unlike Waterman, had a smaller territory, and, although it was med pay claims that caused Waterman the most problems and delays, Dollase was not responsible to adjust the med pay claims from the field, which, instead, were handled by the regional office. Later, Allied characterized the March trip to Colorado as "ten days of general field adjuster training" and Allied included three days of travel as training days in an obvious attempt to portray the training as more extensive than it actually was.

By the end of April, Waterman was still overwhelmed by the claims, and the stress of the job began to impact his health. On April 30, 2001, Waterman e-mailed Thomas expressing his concern about his health, and requested, if possible, to change in his job responsibilities back to that of adjusting primarily property damage claims, which he was familiar. Following Waterman's April 30 e-mail, a conference call was held on May 2, 2001, between Waterman, Thomas, Miller and other Allied representatives. It is in this conversation, at a time he was unaware of the comprehensive training program developed by Allied for other NW adjusters,

Waterman, when asked, responded that he did not feel that training was an issue, except that it involved a "learning curve" to become proficient, and reiterated that his primary complaint was the time consumed by med pay claims, and the they were impacting his ability to timely adjust all other claims.

One week later, on May 7, 2001, another conference call ensued between Waterman, Thomas and Miller wherein Thomas and Miller advised Waterman that they could not change his job responsibilities to that of a material damage specialist. Importantly, providing insight into Waterman's lack of training, during that conversation it became apparent that Waterman lacked even sufficient training to obtain form letters to 'cut and paste' from the Allied systems to be utilized in adjusting his med pay claims, prompting Thomas to schedule a trip to Boise to ostensibly assist Waterman in this endeavor.

Prior to going to Boise to "assist" Waterman in helping to train him to find forms to deal with his med pay claims, Thomas undertook both a claims audit and, when in Boise, a field review of Waterman's existing claims, following which Waterman was provided with his second written warning. On May 22, 2001, following a three-way telephone conference between Waterman, Thomas, and a claims supervisor, Waterman was provided a new "Work Improvement Action Plan", which threatened, "Further disciplinary action may include...termination of employment." More time was spent by Thomas chastising Waterman, auditing his files, and initiating the further disciplinary step, and very little time was spent in training. Despite this fact, later, Allied, in defending its position that

Waterman was adequately trained, listed Thomas's trip to Boise to audit his files as three additional days of "one-on-one training" in an attempt to make Waterman's training appear to be more extensive than what actually occurred.

Waterman's last day at work for Allied was June 4, 2001. On June 5, 2001, Waterman took a two week vacation which had been previously scheduled, and upon his return, on June 14, 2001, he found himself unable to work. By this time, Waterman's health had deteriorated, and shortly thereafter, he was diagnosed as suffering from depression relating to his job requirements, and was placed on FMLA leave. By June 4, 2001, Waterman had now successfully adjusted the majority of the pending NW claims, and, therefore, Waterman's skills as a NW adjuster were no longer a necessity under Allied's integration model.

On September 5, 2001, the expiration of Waterman's FMLA benefits, Waterman (now age 50) received a letter from Thomas indicating that a "business decision has been made to re-staff his position". Following the FMLA expiration, Allied placed Waterman on long-term disability, which he did not request or apply for, which was subsequently denied following an independent medical exam arranged by Allied. Following the denial, and in accordance with Allied's policy, Waterman continued to receive pay for an additional 60 days, and, although no re-employment assistance was offered by Allied, Waterman was invited to go on-line and re-apply for other open out of state Allied positions if he wished.

The entire time that Waterman worked for Allied, from the implementation of the integration in January 1, 2001, up until the last date he worked,

Waterman was the sole adjuster in Boise. However, in September, once the decision was made to re-staff his position, Allied was immediately able to re-staff both Boise field adjuster vacancies by two substantially younger adjusters. Tamyra Gent [hereinafter "Gent"] was hired by Allstate to replace Waterman. The job was posted on September 6, Gent was extended an offer on September 24, 2001, and her first day on the job was October 6, 2001. Gent was 41 years of age when she was hired. McLeish was replaced by Richard Reed [hereinafter "Reed"] (age 40) on September 17, 2001. Reed was simply transferred by Allied to replace McLeish from another Allied office. Elsewhere, Thomas testified that it was Reed, not Gent, who was transferred to the Boise claims office to fill Waterman's position.

Shortly after Gent was hired, Allied reverted back to a model similar to the NW model as it existed prior to the integration. Gent was eventually assigned property damage only claims. The med pay claims were transferred from the field to the regional office, and the two new Boise field adjusters no longer had to deal with med pay.

Tom Walsh [hereinafter "Walsh"], a claims director for Allied in Portland, i.e., holding the same position that was held by Miller in Idaho, testified that he was aware of some statements made in group meetings wherein Allied was referred to as a 'young company' prior to the implementation of the Allied model. It was Walsh's understanding that it was Lex, the CEO in charge of the integration, who had made the statements. Walsh further testified that he did not understand what the statement meant:

> "Q: We talked about Allied being referred to as a young company. Do you

> know if that meant that they hadn't been in business very long or did that mean that they have some sort of youth movement with respect to either their policies, procedures or employment? A: I don't know."

At trial, Waterman presented the testimony of Mike Mannell, [hereinafter "Mannell"]a claims manager in Bellevue, Washington, holding the same position as Thomas in Idaho. In January of 2001, Walsh and Schilling, the Allied executive in charge of actually implementing the Allied model, were in Bellevue, Washington, to visit with Mannell, who was in the midst of a hiring decision to staff the new model, and was faced with the choice of hiring either a young employee or an older employee. Mannell was leaning towards hiring the older employee. Schilling came into his office, and shut the door, telling Mannell, "Mr. Walsh tells me you are a player", and urged him to hire the younger candidate. And, although Schilling did not reference age as the reason *per se* in his ensuing conversation with Mannell, Schilling, as he was leaving his office and opening the door to depart, turned to Mannell and stated, "Well, you know, Allied is a young company".

NW presented the testimony of Lex at trial. During his testimony, he denied making the statement, although he admitted that he had heard Allied referred to as a 'young company'. Lex explained the reference meant that, "Allied was a much smaller and immature company, in terms of its growth by comparative to the NW organization", and clarified on cross examination that the reference to a 'young company' is simply that Allied was a younger company than NW. There was evidence before the

jury that Allied was founded in Des Moines, Iowa, in 1929, and has grown steadily ever since. NW was started in 1925 or 1926 in Ohio as Farm Bureau Mutual Automobile Insurance Association, and, beginning in 1955, Farm Bureau changed its name to Nationwide.

Prior to the integration, Waterman had an exemplary track record with NW. In all of his performance evaluations preceding the integration, Waterman was rated at "meets" or "above". For the years 1993 through 1999, Waterman was rated at "above". For the year 2000, the year immediately preceding the implementation of the Allied model, utilizing a new subjective format, Waterman was rated as "achieves expectations".

Waterman believes that Allied did not want to retain him, that he was perceived as an undesirable employee because of his age, and, that he did not fit the young company image desired by Allied. Waterman further believes that, because of McLeish's departure at the time of the roll out, Allied was 'stuck' with him, and used him based upon necessity to resolve the pending claims, with no intent to keep him as an employee beyond that date, and therefore, he was placed into a position to fail. Waterman believes that Allied coincided his disciplinary process with this adjustment of the pending claims, so, at the conclusion, he cold be discharged based upon 'poor performance', and be replaced by substantially younger employees. Waterman further believes that on June 4th, 2001, the last day he worked for Allied, at a time when the pending claims were almost resolved, based upon Allied's unreasonable and escalating disciplinary process, his discharge was imminent.

REASONS FOR GRANTING THE PETITION

The opinion issued by the Supreme Court of the State of Idaho [hereinafter Idaho Supreme Court] on January 22, 2009, left unaddressed, will stand as guidance for trial court judges and the Idaho Court of Appeals, virtually assuring that plaintiffs in Idaho will not be afforded the protection offered by the Act in a manner afforded to citizens of other states. An objective review of the Idaho Supreme Court's opinion in conjunction with the evidence presented at trial supports, at least, the following criticisms: First, the opinion facially demonstrates a lack of understanding of how and why the *McDonnell Douglas*[1] burden shifting framework is to be utilized and applied; second, the decision facially demonstrates that the Idaho Supreme Court wholly misconceives the evidentiary burden placed on the plaintiff in establishing his prima facie case; and, thirdly, that both the Idaho Supreme Court and the trial judge impermissibly substituted their own weight of the evidence for that of the jury. Clearly, guidance is required to clear up the obvious confusion that still exists with state courts when applying the *McDonnell Douglas* indirect method of proof. Of most importance to the client, this Petition should be granted as this Court stands as the court of last resort if justice is to be obtained on his behalf.

This Court has yet to address constructive discharge in the context of the ADEA and the interplay of a claim of constructive discharge with the other facets of the *McDonnell Douglas* framework, including the prima facie elements, the

---

[1] *McDonnell Douglass v. Green* 411 U.S. 192 (1973)

employer's burden of production to proffer a legitimate non-discriminatory reason to justify or explain its conduct in the face of an allegation of constructive discharge, and, finally, the evidentiary burden on the constructively discharged employee on how to successfully establish pretext.

This Court should take advantage of the novel fact pattern underlying Waterman's claim as an opportunity to demonstrate the inherent flexibility of the *McDonnell Douglas* framework to adapt to unique factual situations; and to reconfirm that it is the jury's role to determine conflicts of facts and to caution the courts to exercise more care before dismissing a jury's findings as unsupported by the record.

In discussing each of the issues above, this Court will have the further opportunity to address additional sub-issues, including the relevance and probative value of alleged ageist statements made by a CEO, and what age difference qualifies as "substantially younger" to support a prima facia case and thereby correcting the conflict existing between the various circuits[2].

---

[2] Replacement can be older: *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 559 (10th Cir. 1996) *but see Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034 (8th Cor. 2007) (no evidence that replacement who was four years younger than plaintiff was a scheme to evade the ADEA; declining to follow *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, (10th Cir. 1996)); 7-year age difference is sufficient: *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 23 (1st Cir 2001); 10-year age gap; *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 892 (7th Cir. 1997); 5-year disparit is not enough: *Schlitz v. Burlington Northern Railroad*, 115 F.3d 1407, 1413 (8th Cir. 1997); 3-year gap: *Carter v. Decisionone Corp.*, 122 F.3d 997 (11th Cir. 1997); The Seventh Circuit has established a bright-line rule of a 10-year age difference between a plaintiff and his replacement for

The Idaho Supreme Court in reviewing the trial court below, noted the trial court granted Allied's Motion for a Directed Verdict on the basis that a reasonable person could not find in favor of Waterman on the second, third or fourth elements of an ADEA claim. However, because the Idaho Supreme Court upheld the trial court's grant of Motion for a Directed Verdict, yet chose to address only the third element as being dispositive, its analysis remains so seriously flawed in that regard that it is now necessary to review the entire record anew to re-determine if the trial judge's ruling was proper. If this petition were to be granted, to address only the third element would leave Waterman exposed to additional rounds of appeals after remand.

DISCUSSION

As a template against which to analyze the Idaho Supreme Court opinion, it is first necessary to discuss, quickly, how the *McDonnell Douglas* analytical framework is supposed to work.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), this Court created an analytical framework that creates an inference of disparate treatment "to compensate for the fact that direct evidence of intentional discrimination is hard to come by". *Price Waterhouse v. Hopkins*, 490 U.S. at 271 (O'Conner,

---

a plaintiff to establish a *prima facie* case. See *Balderston v. Fairbanks Morse Engine*, 328 F.3d 309, 322 (7th Cir 2003). The Sixth Circuit has joined the Seventh Circuit in adopting a rule that an age difference of six years of less between the plaintiff and her replacement is presumptively not significant enough to establish a *prima facie* case.

J. concurring). This indirect method of proof, known as the "*McDonnell Douglas*", "inferential", or "indirect" method has been modified and clarified by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products Company, Inc.* 530 U.S. 133 (2000).

Under the *McDonnell Douglas* method, a plaintiff relying on circumstantial evidence must first establish a prima facie case of unlawful discrimination. If the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises, and the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action.

The prima facie case under the *McDonnell Douglas* framework is intended to create "a presumption that the employer unlawfully discriminated against the employee by eliminating the most common non-discriminatory reasons for the employer's action." (*Burdine*, 450 U.S. at 254, 101 S.Ct. 1089) The plaintiff's burden of proof is de minimis at the prima facia state. *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 65 (2nd Cr. 1995) In order to rebut this presumption and reestablish the employee's duty to prove that age discrimination was in fact a motivating factor in the adverse employment decision, the employer must present evidence showing a legitimate, non-discriminatory reason for its decision. The employer's burden in this regard is one of production, not persuasion. Once the employer has proffered a legitimate, non-discriminatory reason for its decision, the presumption created by the prima facie case then "drops out of the equation" unless the employee can

then show that the employer's asserted neutral reason was actually a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515

The reasons proffered by the employer, must be "clear and reasonably specific". *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) The employer's legitimate non-discriminatory reason must be articulated with sufficient specificity as "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext". *Burdine*, 450 U.S. at 255-256. If the employer fails to produce a legitimate non-discriminatory reason, then the inference of discrimination remains, and judgment is proper for the plaintiff as a matter of law.

Pretext can be established by the plaintiff, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's preferred explanation is unworthy of credence". *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) Pretext exists when an employer does not honestly represent its reasons for terminating an employee. *Miller v. Eby Realty Group, LLC*, 396 F.3d 1105, 1111 (10th Circuit 2005) Plaintiff can prove pretext by showing "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions" in the employer's legitimate, non-discriminatory reason sufficient to support a finding that the reason is not worthy of belief. *Timmerman vs. U.S. Bank, N.A.*, 483 F.3d 1106, 1113 (10th Circuit 2007)

If the prima facia case is sufficiently strong, then the inference afforded thereby,, when combined

with a showing of pretext, may, by itself, support a jury finding of discrimination:

> "A plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where...no rational fact finder could conclude that the action was discriminatory." *Reeves v. Sanderson Plumbing Products, Inc.*, supra, 530 U.S. at pgs. 148, 149)

However, the burden of persuasion to show a violation of the ADEA remains at all time with the plaintiff. The plaintiff must establish, by the preponderance of the evidence, that age actually played a role in the decision making process. *Hazen Paper Company v. Biggins* 507 U.S. 604, 609 (1993)

There is a split in the circuits as to the evidentiary burden borne by the plaintiff to establish pretext. In the minority position, the Third Circuit, *Fuentes v. Perski*, 32F.3d 759 (3rd Circuit 1994), the Seventh Circuit, *Olson v. Marshall and Ilsley Corp.*, 267 F.3d 597 (7th Circuit 2001), the Eleventh Circuit *Chapman v. A1 Transport*, 229 F.3d 1012 (11th Circuit 2000), and the Fifth Circuit. *Auguster v. Vermilion Parish School Board*, 249 F.3d 400 (5th Circuit 2001) require that the plaintiff must establish pretext as to each and every reason proffered by the employer.

Although this Court initially established the *McDonnell Douglas* framework for analyzing circumstantial evidence in a Title VII case, the prima facia elements have been modified to fit ADEA claims. The Ninth Circuit, for an incumbent employee who is discharged, provides the following elements: (1) Plaintiff was a member of the protected class; (2) he was performing his job in a satisfactory manner; (3) he was discharged or his employer took adverse employment action against him; (4) that his position was filled by a younger person of equal or lesser qualifications. [*Wallace v. J.R. Simplot Company*, 26 F.3d 885, 891 (9th Circuit 1994, *Peterson v. Hewlett Packard Company*, 358 F.3d 599, 603 (9th Circuit 2004)]

IMPERMISSIBLE BURDEN OF PROOF

This Court has spent three and a half decades in developing and refining the indirect method of proof set forth in the *McDonnell Douglas* framework, demonstrating its flexibility to meet novel and evolving fact patterns, and carefully explaining the underlying reasons supporting the precise allocations of the burdens of proof as to each step. Unless and analysis of circumstantial evidence is under taken in conformation with this framework, the results are meaningless.

The Idaho Supreme Court opinion does not even acknowledge that such a framework exists, but merely lists the four elements necessary to establish the prima facia case before launching into a flawed analysis, establishing dangerous precedent for the Idaho courts and practitioners. Most dangerous as precedent is the Idaho Supreme Court's misconception that the plaintiff must come forward

with independent proof, in addition to the inference of discrimination afforded by the fourth element, to establish his prima facie case. No discussion is provided as to why the prima facie case exists, nor explains its intended purpose in the overall analytical analysis. The Idaho Supreme Court wholly disregards the fourth element, or its purpose, in its entirety, and simply concludes that the plaintiff's reliance on "two stray comments that Nationwide-Allied was a young company" as insufficient evidence at the prima facie stage to support a conclusion that the 'adverse impact' was motivated by age discrimination as a matter of law.

In this case, to satisfy the fourth element, it is uncontested that the plaintiff was replaced by one, if not two, substantially younger adjusters. Under the correct application of the prima facie case, it is this fourth element which is to inject the rebuttable presumption of age discrimination into the equation, so that the analysis can move forward to the second stage, requiring the employer to come forward with its legitimate non-discriminatory reason, in order to clarify and frame the issues, so that the plaintiff has the full and fair opportunity to establish pretext. Clearly the Idaho Supreme Court imposes the incorrect burden of proof in on the plaintiff on the prima facie case, and, now, this misconception of the plaintiff's burden can only be corrected by this Court.

Moreover, when the Idaho Supreme Court reviews the evidence to determine if the facts support the plaintiff's allegation of constructive discharge as the adverse impact, the Court, like the trial court, engages in its own impermissible weighing of the evidence. Rather than review the circumstantial evidence in its entirety, the court selects isolated bits and pieces of circumstantial evidence and finds each

to be insufficient to support an inference age discrimination. Courts must, instead, look to the totality of the circumstances and consider the cumulative weight of all circumstantial evidence. *Troupe v. May Department Stores, Inc.*, F.3d 734 (7th Cir. 1994) This Court has recently reaffirmed its commitment to viewing evidence as a whole and not in pieces in *United States v. Arvizu*, 534 U.S. 266 (2002). Although *Arvizu* is a Fourth Amendment case, the Court rejected the approach taken by the Ninth Circuit of looking at each act separately and then rejecting the claim if an "innocent explanation" could be attached to each incident.

Some of the "findings" by the Idaho Supreme Court are noteworthy, and illustrate the court's failure to apply the correct standard of review; i.e., that the facts are to be reviewed in a light most favorable to the petitioner. For example, the written disciplinary warning in February is characterized "as an attempt to help Waterman", disregarding the petitioner's argument and evidence that the written warning was not legitimate in light of all other factors occurring to Waterman in the first 30 days of employment with Allied.

And, in summarily dismissing Waterman's claim that he received inadequate training, the Court latched onto Waterman's statement in a conversation which occurred on May 3rd, 2001, wherein Waterman responded that lack of training was not his complaint. The Court ignores that additional evidence was placed before the jury that this statement was made at a time where Waterman thought it was his responsibility to "self-teach" himself on the systems, and that he was not being allowed enough time "for the learning curve". Further, Waterman was unaware of Allied's

comprehensive training schedule or of the training made available to other NW adjusters. To place such weigh on Waterman's subjective opinion of the adequacy of his training in such a vacuum is to impermissibly weight the evidence.

The Idaho Supreme Court's perplexing use of the *McDonnell Douglas* framework, with its heavy impermissible burdens placed upon the plaintiff at the prima facie stage, and its impermissible weighing of the evidence, have derailed the very purpose for which the framework exists, and has deprived Waterman of that inference for which the framework was established, and this misapplication needs to be corrected.

CONSTRUCTIVE DISCHARGE

Claims of constructive discharge can be particularly troublesome at the prima facie stage of the *McDonnell Douglas* framework, for constructive discharge is rarely the result of a single event, but rather, the result of a process. It is Waterman's allegation that he was placed into a position to fail, and therefore Allied's discriminatory intent would have existed prior to Waterman's employment with Allied. Therefore, his allegation of constructive discharge bleeds into the second element, the requirement that Waterman establish "satisfactory job performance" at the time of his discharge. Prior to being placed into a position to fail, the evidence clearly supports that Waterman was performing his job in a satisfactory manner. Waterman had been an incumbent employee for over 22 years, and had exemplary performance evaluations. The burden on this second element is so slight at the prima facie stage that at least one court has held that an

incumbent employee is presumed to be qualified when he claims to have been unlawfully discharged. *Slattery v. Swiss Reinsurance American Corp.*, 248 F.3d 87, 91)2nd Cir. 2001)

In *Pennsylvania State Police v. Suders* 542 U.S. 129, this Court had the opportunity to discuss constructive discharge in the context of a Title VII claim:

> "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign? (*Pennsylvania State Police v. Suders* 542 U.S. 129, 124 S.Ct. 2342, 2351, (2004)

It was this definition of constructive discharge that was used by the Idaho Supreme Court in evaluating Waterman's claim of adverse impact at the prima facie stage.

In *Suders*, the appellant was basically faced with an "aggravated hostile work environment", where she was harassed on a daily basis by her coworkers based upon a protected trait. Waterman's allegation of constructive discharge, however, is significantly different.

The *Suders* rule is based upon the assumption that the employee quits, as opposed to being actually fired, and is a poor fit here. Waterman did not "quit", but rather, he was diagnosed as having

depression, placed on FMLA, and his position was re-staffed. Applying the *Suder* standard, without modification of the rule to the facts at hand, therefore, further impermissibly impacted Waterman's burden of proof at the prima facie stage.

The analysis of constructive discharge should have been undertaken by the Idaho Supreme Court in such a manner as to preserve the inference of discrimination, and to provide they jury with a concisely framed issue of pretext.

When an employee is not actually discharged by his employer, it becomes more difficult to ascertain the employer's legitimate non-discriminatory reasons for its conduct, for no employer is going to admit its intent and purpose was to make an employee's job so onerous that he would quit, and the employer's proffered reason for its conduct becomes elusive. As a result, a plaintiff, trying to avail himself of the indirect method of proof, when he has been constructively discharged, is always at risk of being deprived the opportunity to demonstrate pretext on the part of the employer. In a 'routine' discharge case, the employer's legitimate non-discriminatory rational for its conduct is easily defined; i.e., "we fired him because he kept poor records". The pretext target is clear; the employee can come forward with evidence that he kept good records, or, as good as other, younger employees. But when an employer denies that an employee was constructively discharged, no clear target emerges.

Moreover, by requiring Waterman to have a "mini trial" to prove by a preponderance of evidence that his workplace was so unbearable that a reasonable person would have felt compelled to quit as part of his prima facie case, seriously detracts from the true issue – whether the employer was

motivated by illegal discrimination. The burden of proof on the employee at the prima facie stage should be no heavier than what would reasonably be required to correctly frame the ultimate issue.

Waterman produced substantial facts to which a juror could have found that Waterman's discharge was imminent based upon poor performance, and that more likely than not he would have been discharged, but for the fact that he went out on FMLA leave. This fact can be inferred in the totality of circumstances, particularly in light of the escalating disciplinary process. This alone should have been sufficient to support Waterman's prima facie case.

Once this is recognized, it should be treated no differently than any other discharge case. With the employer's alleged legitimate non-discriminatory reason identified with clarity, Waterman would then have the full and fair opportunity to establish pretext. Indeed, all of the facts introduced at trial to support the finding by the jury that his workplace was unendurable, and that his employer's expectations were not legitimate, now become highly relevant in demonstrating that Allied's claims of poor performance was pretextual. In this manner, the evidence offered by the employee is not held to an impermissible higher burden of proof at the prima facie stage.

PROOF OF DISCRIMINATION

The Idaho Supreme Court found that there was no evidence to allow an inference of discriminatory intent. Discriminatory intent was established by Waterman's showing of pretext. The evidence supports that many legitimate reasons for

'poor performance' existed. Pretext was further established by evidence uncovering Allied's deliberate attempt to overstate Waterman's training, which seriously impacted Allied's credibility, and allows a strong inference that Allied knew its training was deficient. A jury could infer, like the switch for the two computers, that Allied was not worried about the sufficiency of Waterman's training, for Waterman was to be retired along with the NW system upon his completion of pending claims. The evidence was so strong the jury based its finding of constructive discharge on the higher standard of 'intolerable conditions'.

The ADEA was created to protect employees from employers making decisions based upon stereotyping due to age. A common reoccurring stereotype in case law is that older employees are not as aggressive as younger employees. This was succinctly stated by Judge Birch, circuit judge, concurring in part and dissenting in part, in *Chapman v. A1 Transport*, 229 F.3d 1012 at 1047 (11th Circuit 2000):

> "It is interesting how often in the case law the words "young" and "aggressive" are linked together by defendant employers. The very frequency of this conjunction supports the conclusion that "aggressive" is a sign of "age bias, i.e.,...the assumption that older employees lack the aggressive and competitive disposition likely to be possessed by younger employees..." *Woroski v. Nashaua Corp.*, 31 F.3d 105, 109, n.2 (2nd Circuit 1994)"

> In addition to the inference afforded by Waterman's replacements being substantially younger, and Waterman's strong showing of pretext, petitioner believes that the evidence produced at trial regarding Allied as a "young company" are more than 'stray remarks', and, likewise, provides some additional circumstantial evidence that the employer was motivated by age. Different treatment should be used to assess ageist remarks when they are made by a CEO, for they may be evidence of a corporate atmosphere or culture; a culture that, intentionally or accidently, could be perceived as expressing a preference for youth by supervisors and managers, particularly if they want to be perceived as 'team players', when in the process of hiring and firing employees to staff a new business model, for, "when a major company executive speaks, 'everyone listens" in the corporate hierarchy." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3rd Cir. 1995) Lex, the CEO of the Allied model in the west, was attributed with the statement that "Allied is a young company" in corporate meetings regarding the integration of NW into the Allied model.

This inference that the "young company" remarks may have infected Allied's hiring and firing of employees becomes unmistakable in light of the testimony of Mannell, a claims manger, when Schilling thought Mannell was a "player", and urged him to hire the young employee by stating, as he was exiting the door, to remember that "Allied is a young company".

The fact that the CEO, Lex, and that Schilling, another high ranking employee, as well as supervisors and managers were aware of the

statement seem to make it more likely than not that the illegal criteria of age discrimination was indeed influencing Allied in its selection of employees. McLeish, who was first retained, fit the 'young company' image, as did Lex, Thomas, and all other employees hired or transferred to staff the model in Idaho.

Lex, providing testimony at trial, although he denied making the statement, nevertheless testified that reference to Allied as a "young company" meant that "Allied was a much was a much smaller and immature company, in terms of its growth by comparative to the NW organization". Lex further clarified on cross examination that the reference to a 'young company' is simply that Allied was a younger company than Nationwide". However, when the jury was presented evidence that Nationwide was founded in 1926, and Allied in 1929, the jury could have surmised that Lex's explanation was less than honest and assigned a more sinister illegal import to the statement.

Other circumstantial evidence exists. Miller, who did not know Waterman, in stating to Waterman only two weeks into the roll out, that he was not a "team player", that had a "nine-to-five mentality" and that he "needed to get on the bus", is direct evidence that Waterman was stereotyped by Miller, and circumstantial evidence that it may have been age based. All one needs to do is substitute "you older employees" for "Nationwide employees", and then the stereotyping is abundantly clear, i.e., Waterman is 'set in his ways' and 'not aggressive'.

And, every time Waterman sought help from his regional office, he was chided to "work harder, work faster", i.e., implying that he did work as hard, or as fast, as other employees, a trait commonly

associated with age stereotyping. These assumptions on the part of his supervisors that Waterman's alleged inability to adapt to change, to work harder, to work faster were imbedded to such a degree that no real investigation was undertaken to discover if other reasons may have existed that would explain or otherwise legitimize Waterman's position that he was being overburdened by claims. These were not single incidences, and are infused throughout Waterman's five months of actual employment with Allied.

Finally, this case was defended by Allied at trial based upon insinuations directly related to age stereotyping. On cross examination, the attorney for Allied attempted to establish that, prior to the integration, Waterman's employment with NW was "cushy", and that Waterman was not ambitious, and that Waterman was simply unable to adapt to change, all of which contain age stereotyping. Petitioner believes that these cumulative facts, coupled with the inference provided by the prima facie case, coupled with Waterman's strong showing of pretext (strong enough to support a jury finding of constructive discharge) as to poor performance, is ample to support the jury verdict in this matter. Therefore, it is respectfully requested that this Petition for a Writ of Certiorari be granted to correct this error.

WILLFUL

"Willfulness" exists where the employer knowingly violates the ADEA or shows reckless disregard for whether its conduct violated the Act. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985), quoting *Air Line Pilots Associated, International v.*

Trans World Airlines, Inc., 713 F.2d 940, 956 (2nd Cir. 1983) A plaintiff need not show that the defendant's conduct was outrageous or egregious for a court to find willfulness. *Hazen Paper Co., v. Biggins*, 507 U.S. 604, 617 (1993); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 391 (5th Cir. 2003).

The facts clearly support the juries finding in this regard.

CONCLUSION

For all the reasons set forth above, petitioner respectfully requests his Writ of Certiorari be granted, so this matter can be fully briefed.

Lawrence E. Kirkendall,
Counsel of Record
KIRKENDALL LAW OFFICE, CHTD.
2995 North Cole Road, Suite 260
Boise, Idaho 83704
Telephone: (208) 345-5262

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOE C. WATERMAN,	)
	) Docket No. 33883
Plaintiff-Appellant,	)
	) Boise, December 2008
	) Term
v.	)
	) 2009 Opinion No. 7
NATIONWIDE MUTUAL	)
INSURANCE	) Filed: January 22,2009
COMPANY and ALLIED	)
INSURANCE COMPANY,	) Stephen W. Kenyon,
	)Clerk
	)
Defendants-Respondents.	)

Appeal from the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

The decision of the district court is affirmed. Respondent's request for attorney's fees on appeal is denied. Costs are awarded to respondent.

Kirkendall Law Office and Law Offices of Peter Desler, PC, Boise, for appellant. Peter Desler argued.

Moffatt, Thomas, Barrett, Rock & Fields, Chartered, Boise, for respondent. Patricia M. Olsson argued.

W. JONES, Justice

NATURE OF CASE

Joe Waterman (Appellant) brought an action against his former employer, Nationwide Mutual Insurance Company and Allied Insurance Company (collectively Respondent). Although Appellant initially filed several causes of action, the case proceeded to trial only on Respondent's alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA). After the jury returned a verdict in favor of Appellant, awarding him $700,000.00 in damages, the district court granted Respondent's motion for directed verdict. Appellant brings this appeal requesting this Court to reverse the district court's directed verdict ruling and to reinstate the jury verdict in his favor.

FACTUAL AND PROCEDURAL BACKGROUND

Nationwide hired Appellant in 1979 as an insurance claims adjustor and gave him "pretty intense" training during his first six months on the job. Appellant was the sole Nationwide adjustor in the Boise area until approximately 1993, at which time the number of claims in the Boise area increased and Nationwide hired a second adjustor. Until that time, Appellant handled multiline claims, including homeowner, auto, property damage, and bodily injury and liability investigations. After the second adjustor was hired, Appellant's responsibility was limited to property damage claims. In 2000, the second adjustor left the Boise office, but Appellant continued to handle property damage claims

exclusively until 2001, which is when the alleged adverse employment actions commenced.

Nationwide purchased Allied Group Inc. in October 1998. The two companies began integrating in 2000. Prior to the merger, Nationwide used the Class software system to handle claims and Allied used the Passport software system. Mike Lex (Mr. Lex), Allied's Regional Vice-President, testified that he was in charge of transitioning the companies to one common claims handling software system. He testified that the company chose to convert all claims handling processes to the Allied Passport model to achieve the goal of a lower loss expense ratio.

Mr. Lex also testified he was part of the team that determined which adjustors would be retained after the merger. To accomplish this task, all employees were required to fill out a Technical Background Update explaining their technical competency and prior performance. In July of 2000, Appellant filled out a Technical Background Update wherein he listed 21.5 years experience in auto and property damage claims and 15 years experience in med pay, bodily injury, litigation, general liability and personal injury protection.

From June through October 2000, Appellant received a weekly company publication entitled "Up to Date: An Integration Update for Nationwide's Western States Claims Associates," which answered in-depth questions about the merger. Appellant first learned in early October of 2000 that he would have a position with the company after the merger as a multiline adjustor. Appellant testified that his supervisor never physically handed him a job description, but he also admitted that such materials were available online for review.

Prior to the merger, Appellant worked out of an office, but in December 2000, he was required to move his office into his house. Appellant was expected to settle the Nationwide claims that existed prior to the merger on the Nationwide software system while simultaneously transitioning to the new Allied software system. This required Appellant to set up two separate computers in his home office because the Allied and Nationwide software systems could not run on the same computer. DSL[3] was not available at Appellant's home office at that time, so he had to use a dial-up line and completely shut down one computer and boot up the other computer any time that he needed to change between the two software systems. Appellant mentioned that the company gave another adjustor a switch that allowed her to go quickly and easily from one program to another. Appellant requested such a switch but was denied. Appellant testified that the company indicated "it's only a matter of time before you are done with the pending claims on Class and it's not within our affordability to do that."

The parties dispute when Appellant began processing Allied claims. Appellant argues it was on January 1, 2001; Respondent claims it was not until February 2001. Either way, Appellant testified that the increased number of claims overwhelmed him and his requests for help went unanswered. However, Respondent put on evidence that Appellant was not meeting the company's expectations for workload or timeliness. On

---

[3] "DSL" is shorthand for "digital subscriber line," which is a speedy medium for transferring data over regular phone lines and can be used to connect to the Internet. *See* The Tech Terms Computer Dictionary, http://www.techterms.com/definitions/dsl (last visited Dec. 5, 2008)

February 4, 2001, Appellant was given a verbal warning for failure to comply with claims handling criteria. In March 2001, Respondent attempted to help Appellant by creating an action plan to improve his performance.

Appellant argues that he did not receive proper training on the Allied Passport system. He testified that he attended two meetings in Denver, his boss visited him once in Boise, and he spent a few days job shadowing an adjustor in Colorado. Appellant stated that Respondent failed in each situation to provide him even the most basic training that would be required for him to perform the job adequately. However, on May 2, 2001, during a conference call between Appellant and his supervisors that was set up to discuss Appellant's performance issues, Appellant indicated to Nita Dunn, Respondent's human resources consultant, that a lack of training was not the reason for his poor performance:

> Dunn: And it is not because, if I understand you correctly it is not because you feel that uh you haven't received enough training or that you don't have the proper tools to do your job. But simply that the workload is too heavy.
>
> Waterman: Correct.

On May 22, 2001, Appellant agreed to a work improvement plan that called for Appellant to become compliant with Respondent's claims handling standards by 50% within one month and

75% within three months. Around this time Appellant requested a severance package from Respondent, which Respondent denied, stating "your request for consideration of a severance option was unusual, as your position with Allied has not been eliminated."

From June 4, 2001 through June 14, 2001, Appellant went on a preplanned vacation. Immediately following his vacation, Appellant took leave under the Family and Medical Leave Act (FMLA) due to depression and his doctor's advice not to work for four to six months. Appellant received a letter dated September 5, 2001 stating that his FMLA leave was exhausted and "based on business needs, a decision has been made to restaff your position. This decision does not reflect on your ability to do your job, but rather the company's need to ensure the job gets done despite your absence." On September 6, 2001, Respondent posted a position for a Boise area claims adjustor. On September 17, 2001, Appellant was specifically told that his position had not yet been restaffed and that he should try a gradual return to work, but he refused, stating he did not believe he could ever return to a normal workload. On September 24, 2001, Respondent filled the position with Tamyra Gent, age 41.

As of the date Appellant's FMLA leave expired, Respondent placed him on long-term disability and he received approximately 60% of his salary. Appellant was subsequently found not to be disabled after an independent medical examination was conducted. On April 27, 2002, Respondent reinstated Appellant's full salary for two months and advised Appellant to search for a new job within the company, but there were no positions available in

Boise and Appellant was not willing to relocate. Appellant was 51 years old as of his last day of employment with Respondent.

On July 24, 2004, Appellant filed a Complaint and Demand for Jury Trial against Respondent asserting various causes of action that primarily focused on age discrimination. Respondent filed an Answer, essentially denying the allegations made by Appellant and raising the following affirmative defenses, among others: defendant's actions were taken for legitimate, non-discriminatory reasons and without regard to plaintiff's age, plaintiff failed to take advantage of preventative or corrective opportunities provided by defendant or to otherwise avoid harm, and defendant acted in good faith in applying policies of which plaintiff was aware when he was hired and during his employment. The jury trial commenced on December 13, 2006, and lasted four days.

During trial, Appellant presented testimony by a claims director that he was aware of "some statements made in group meetings where Allied was referred to as a young company." However, the claims director did not know what the statements meant. Appellant also presented testimony of a district claims manager that, in reference to a conversation with his supervisor about a job applicant who was in his sixties, his supervisor stated to him, "Well, you know, Allied is a young company." The inference was that the job applicant was too old for the position, but he was ultimately hired.

After Appellant rested his case, Respondent moved for directed verdict, alleging Appellant failed to establish a *prima facie* case of age discrimination because a reasonable person could

not find the second, third, or fourth elements of an ADEA claim. The district court denied Respondent's motion for directed verdict, but noted that Respondent could renew its motion at the end of trial. Respondent then presented its defense case.

On December 20, 2006, both sides rested and Respondent renewed its motion for directed verdict. The court took it under advisement. The jury returned a 9-3 verdict in favor of Appellant and awarded $700,000.00 in damages. After the district court dismissed the jury, Respondent again renewed its motion for directed verdict. The court granted the motion, stating, "I've considered this carefully. I fully expected the jury to take me off the hook on this, but they have not. I'm satisfied that the plaintiff has failed to establish the requisite elements and that a properly deliberative jury could not have reached the verdict that they did." On December 21, 2006, the court issued its written Ruling on Motion for Directed Verdict. On December 27, 2006, the court entered judgment against Appellant and in favor of Respondent. There is no evidence in the record that either party requested or received attorney fees below. Appellant brought this appeal seeking reinstatement of the jury verdict in the amount of $700,000.00, plus interest. Respondent requests attorney fees on appeal.

ISSUES ON APPEAL

1. Did the district court err in granting Respondent's motion for directed verdict?[4]

---

[4] After the jury returned the verdict, Respondent should have moved for judgment notwithstanding the verdict rather than renew its motion for directed verdict. See I.R.C.P. § 50.

2. Is Respondent entitled to attorney fees on appeal?

STANDARD OF REVIEW

In reviewing a decision to grant or deny a motion for directed verdict or a judgment notwithstanding the verdict, this Court applies the same standard as that applied by the trial court when originally ruling on the motion. *Gunter v. Murphy's Lounge, LLC,* 141 Idaho 16, 27, 105 P.3d 676, 687 (2005) (citation omitted). This Court conducts an independent review of the evidence and does not defer to the trial court's findings. *Id.* This Court must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury. *Id.* The substantial evidence test does not require the evidence be uncontradicted. *Id.* It requires only that the evidence be of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper. *Id.*

Federal law guides this Court in its interpretation of ADEA claims. *See O 'Dell v. Basabe,* 119 Idaho 796, 811, 810 P.2d 1082, 1097 (1991) (citations omitted). Different jurisdictions, both within and outside the state of Idaho, recite the elements of an ADEA claim differently. To establish an age discrimination claim for the purposes of this

---

However, the two motions are reviewed under the same standard for the purposes of this case any distinction between the motions is without a difference.

case, Appellant must first demonstrate that he was a member of a protected class, which here is an employee at least 40 years of age. 29 U.S.C. § 631(a); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994). Second, he must demonstrate that he was performing his job in a satisfactory manner. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004); *Wallis*, 26 F.3d at 891. Third, he must demonstrate that he was discharged or his employer took adverse employment action against him. *Id.* Fourth, he must demonstrate that his position was filled by a younger person of equal or lesser qualifications. *Wallis*, 26 F.3d at 891. In this case, the third element of Appellant's ADEA claim is dispositive, so we need not address elements one, two, or four.

ANALYSIS

The district court did not err in granting Respondent's motion for directed verdict.

To establish the third element of Appellant's ADEA claim, he must prove he was discharged or Respondent took adverse employment action against him. In this case, Appellant contends he was constructively discharged. "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (*quoting Penn. State Police v. Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342, 2351 (2004)). Under the adverse employment action doctrine, the United States

Supreme Court has stated, "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S. Ct. 2257, 2268 (1998) *(comparing Crady v. Liberty Nat. Bank & Trust Co. ofInd.* 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation"), with *Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (7th Cir. 1994) (a "bruised ego" is not enough), *Kocsis v. Multi-Care Management, Inc.,* 97 F.3d 876, 887 (6th Cir. 1996) (demotion without change in pay, benefits, duties, or prestige insufficient), and *Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more inconvenient job insufficient)).

When a plaintiff alleges disparate treatment by an employer in an ADEA case, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 141, 120 S. Ct. 2097, 2105 (2000) *(quoting Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993)). Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome. *Id.* Stray

remarks are insufficient to establish discrimination. *Nesbit v. Pepsico, Inc.,* 994 F.2d 703, 705 (9th Cir. 1993) *(citing Merrick v. Farmer's Ins. Group,* 892 F.2d 1434, 1438 (9th Cir. 1990)). To establish the nexus between Respondent's allegedly discriminatory motive and the third element of Appellant's ADEA claim, Appellant cites to two stray comments that Nationwide-Allied was a "young company." Appellant failed to put these comments into context and did not produce evidence of the intent behind the comments, thus the stray comments are insufficient to establish a discriminatory intent.

Furthermore, there is no substantial evidence in the record that Appellant was constructively discharged or that Respondent took adverse employment action against him. Appellant presented evidence at trial that he was not happy with his new position after the merger and his responsibilities changed in a way he found unpleasant. However, he failed to establish a nexus between the alleged adverse employment actions of which he complains and any iota of evidence that age discrimination was a motivating factor. Appellant claims he satisfied this element of his ADEA claim by producing evidence at trial that he did not receive adequate training, he had insufficient knowledge of the merger, he was assigned an overwhelming number of claims, he performed the work of a two adjustor job, he was forced to use two computers, and he had to work in intolerable conditions. However, Respondent presented evidence that Appellant specifically denied training was an issue, he was not trained differently than other employees, his claim load was within normal limits, there is no evidence that Appellant

did the work of two adjustors, the computer set-up in Appellant's home was nothing more than a temporary annoyance, and Appellant was on notice of the merger as early as February 2000 and kept advised of the merger by weekly updates. Moreover, Respondent attempted to work with Appellant so he could gradually return to his job, offered to help him find another position within the company after he complained about his new position, and made a good faith offer for him to participate in the company's rehiring process after his benefits were set to expire.

Appellant essentially requests this Court to overturn the district court's entry of directed verdict based on conjecture and speculation that two stray comments provide sufficient evidence of discriminatory animus on the part of Respondent. We decline to do so. Accordingly, we affirm the district court's entry of directed verdict against Appellant. **Respondent is not entitled to attorney fees on appeal.**

Respondent requests attorney fees on appeal pursuant to IC § 12-121. Attorney fees can be awarded on appeal under IC § 12-121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Teton Peaks Inv. Co., LLC v. Ohme,* 146 Idaho 394,__, 195 P.3d. 1207, 1212 (2008). We cannot say Appellant frivolously brought this appeal where the jury found in favor of Appellant, awarded $700,000.00 in damages, and the district court thereafter entered directed verdict against Appellant. Thus, we deny Respondent's request for attorney fees on appeal.

CONCLUSION

After drawing every legitimate inference in favor of Appellant, we find Appellant did not produce substantial evidence to establish the third element of this ADEA claim. Therefore, we affirm the district court's decision to grant Respondent's motion for directed verdict. We deny Respondent's request for attorney fees on appeal. Costs to Respondent.

Justices BURDICK, J. JONES, HORTON and Justice pro tem WALTERS, **CONCUR**

APPENDIX B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOE C. WATERMAN, Plaintiff, v. NATIONWIDE MUTUAL INSURANCE COMPANY, et al., Defendants.	Case No. CV OC 04 05906 D RULING ON MOTION FOR DIRECTED VERDICT

At the close of the case, the defense renewed its motion for a directed verdict, which the court took under advisement. In candid fairness, I felt the defense case was so strong that the safest course for the defense was to allow the jury to give the case a respectful burial.

The case was submitted to the jury, which returned a verdict for the plaintiff. I am convinced under all standards of the law that the jury verdict is wrong, that it is not supported by the evidence and that it cannot stand. Therefore, having reserved my options by taking the defense motion for a directed verdict under advisement, I now rule upon and grant the motion. The defense is granted a directed verdict of dismissal in accordance with its motion, based upon the following considerations.

To establish a case of age discrimination, the plaintiff must prove four essential elements: (1) that

the plaintiff was a member of the protected class, (2) that the plaintiff was performing his employment in a satisfactory manner, (3) that the plaintiff was discriminated against in the workplace, and (4) that the plaintiffs age was a determining factor in the claimed discriminatory action. In this case, and while it is agreed that the plaintiff was a member of the protected class, the plaintiffs attempted proof failed as a matter of law in a number of respects on all three of the remaining elements

I.

Plaintiff must show that he was performing his work in a satisfactory manner before the alleged acts of discrimination took place. The proof failed in this aspect. There was no dispute in the evidence that the plaintiff was not performing in a satisfactory manner. The uncontroverted proof was that his performance was well below standards, and that that at least two levels of management as well as a regional human resources consultant were involved in attempting remedial measures to improve his performance. The plaintiff could only avoid the consequences of this deficit in the proof in one of two ways:

- plaintiff could show that his substandard in performance were only on conditions that constituted intolerable working conditions anyway, and that these intolerable conditions were part of the discriminatory actions being complained of; or
- plaintiff could show that the imposition of conditions giving rise to his substandard performance or that the purported remedial measure being taken were pretextual to the real reason of age discrimination.

As is discussed below, the proof was fatally deficient to show either that the conditions in the workplace were intolerable, or that any of the conditions or remedial measures being taken were a pretext to some conspiracy or plot to discriminate against plaintiff on account of age. Without these saving exceptions, the evidence was undisputed that plaintiff was not performing his job in a satisfactory manner, and the first element of his case fails on this point as a matter of law.

II.

Plaintiff must show that the company took discriminatory action against him in the workplace. The actions may consist of changed conditions of employment which caused damage to the plaintiff or, as here, that his employment was wrongly terminated. In this aspect, the undisputed proof was that plaintiffs position was changed from a specialty adjuster of property damage to a multi-lines adjuster under the Allied model. The overwhelming evidence was that this change was a company-wide restructure of the claims handling procedures, which involved a consolidation of claims offices throughout the western United States. The evidence was clear that everyone's job in the claims area was being evaluated and restructured. There was no suggestion in the proof of any kind that plaintiff was singled out for special treatment in this area.

His own evaluation of his abilities, presented to his management in connection with the restructure and integration of the Allied model, stated in his own words that he considered himself well qualified to be a multi-lines adjuster, and specifically considered himself to be experienced in handling med-pay claims. He was an experienced adjuster with over 22 years' of experience. There is

no suggestion that he was not qualified for the position of multi-lines adjuster, into which he was placed in January of 2001, upon the "roll-out" of the restructure. There was no evidence that plaintiff was treated any differently than any other adjuster in connection with the changeover and restructure of the claims handling processes of Nationwide throughout the western United States. There is nothing in the record from which a properly deliberative jury could conclude that the action of changing his job from what it was under the Nationwide method of operation to a multi-lines adjuster under the new structure of operation could be considered a discriminatory action or an adverse action against the plaintiff in any context whatsoever.

The evidence is clear that the plaintiff was not terminated by any direct action of Nationwide. The only evidence with regard to management's actions towards plaintiffs employment was that the management of Nationwide was continuing to work with the plaintiff to get his performance levels up to normal standards. Although he was being criticized, all of the criticism as accompanied by action plans designed to get the plaintiffs performance up to acceptable standards. All of the documents and all of the testimony clearly indicated that Nationwide expected plaintiff to continue in his position through the summer of 2001; specific goals were set forth for that summer, and signed off on by both plaintiff and his supervisors. Of note is that all that was expected of plaintiff in his last action plan was that he get his performance to 50% of normal within a month, and to 90% of normal with four months. This is the harshest direct criticism of plaintiff s performance that plaintiff was able to show. He was not demoted,

his pay was not affected, he continued with the company at the same level and grade as before.

Plaintiff made much about the fact that his training was not adequate. However, under any interpretation of the case, it is clear that plaintiffs general training was that offered to all claims representatives and that he was not treated any differently than anyone else in general training. The most that can be said was that this training did not occur as early in the transition period as had been planned at one time. There is no indication that lack of training was a problem that persisted, and even the plaintiffs own testimony was that is was a matter of a learning curve that he could handle. The scheduled training sessions were all completed by March of 2001, well before the event of job termination claimed by the plaintiff. All of this was totally insufficient to constitute any direct evidence of discrimination by defendant against plaintiff that had any direct and adverse impact upon plaintiff in the workplace.

The evidence is clear that plaintiff elected to go on vacation in June of 2001; that after his vacation the plaintiff requested and was granted an additional twelve weeks of paid leave under the FMLA; and that after the FMLA leave expired, plaintiff went on indefinite disability leave. There is no indication at all that Nationwide interfered with plaintiffs wishes in any of these decisions. These choices were the plaintiffs own choices, and were not forced upon him in any way.

III.

Plaintiff may make a prima facie case of age discrimination in a wrongful termination case by showing that after the termination, his position was filled by a younger person of equal or lesser

qualifications. Plaintiff has argued that he is entitled to use the presumptions of this method of proof because the adjuster who was hired to fill his position in September of 2001 was much younger. However, his proof fails on an essential leg of this formula.

Plaintiff's position in Nationwide's Boise office was not filled on account of his termination of employment. The position was only filled when he failed to return to work after his FMLA leave had expired and he went on indefinite disability. Plaintiff was not terminated in September - constructively or otherwise - when the replacement adjuster was hired. The entire evidence in the record indicates only that he either chose not to return or was unable to return from work after his FMLA leave had expired and that he continued on indefinite disability. He continued to draw disability, and continued on the rolls of the company for another seven or eight months. He then went back on the payroll at full pay to enable him to seek out another position within company. When he could not find a position in the Boise area, and since he was not willing to relocate, his employment with Nationwide was then ended. But this did not happen until the summer of 2002. There is no dispute in the evidence to any of this.

Plaintiffs termination of employment did not occur until the summer of 2002 — when he was unable to find a suitable position. The younger worker who was hired to fill his position in September of 2001, then, was not hired to replace him after termination, as is required to complete the formula in the McDonald Douglas construct for a prima facie case. None of the activity surrounding his actual termination from the company in the summer

of 2002 had anything to do with Nationwide taking any action against him or with younger workers replacing him. The entire decision to leave the company, which occurred in the summer of 2002, was because he could not find suitable work with the company in the Boise are, and because he did not want to relocate. None of this was remotely connected to the plaintiffs age.

The effect of all this is that this essential leg of plaintiff s circumstantial prima facie case evaporates entirely on careful analysis. There is no basis to draw any inference of age discrimination whatsoever from the fact that his position was filled when he went of indefinite disability leave, since the evidence is clear that he had not been terminated but continued on the rolls of the company.

IV.

Plaintiff claims he was constructively discharged on the basis that his working conditions had become so intolerable that he had no other option but to terminate his employment. The claim fails as a matter of law on a number of levels.

Plaintiff claims that his initial decision to go on leave from the company was occasioned by stress. However, while there was evidence that he suffered from depression and an anxiety disorder, and was prescribed medication and rest, there was no competent evidence that his medical disability was connected in any way to his employment. Plaintiffs own supposition that the stress he claimed to experience was work related was not substantiated by any medical testimony. His own self-diagnosis is not competent as a matter of law to establish the necessary proximate cause between the claimed stress and any work related conditions.

Note that this is different from the requirement for proof of emotional distress as an element of damage in an age discrimination case. I recognize that an individual can claim emotional distress as an element of damage in an ADEA case under the federal cases without the requirement of competent medical proof to establish the necessary linkage. In such case, the federal cases on point seem to acknowledge that emotional distress in a wrongful termination case can be submitted on a subjective basis, and that the testimony of the injured party as to the existence and degree of stress experienced is competent for the proof of this element.

However, the claim of intolerable conditions in the workplace is measured by an objective standard, not subjective, and requires proof of what an ordinary person would consider to be intolerable under the circumstances. Where the question of emotional stability, emotional distress or mental disorders are alleged to be an element of the intolerable conditions, the proof would require competent medical evidence to establish to a reasonable degree of medical probability that the conditions complained of exist, and that such conditions were proximately caused by the intolerable conditions suffered in the workplace. There was no proof on these essential elements.

Plaintiffs working conditions were no different than the conditions of other adjusters working under similar conditions. There was no proof that he was singled out, or placed under any different working conditions than other adjusters in similar circumstances. There is nothing inherently distasteful or disagreeable about any of the conditions he claimed to be intolerable. There was no evidence that anyone else considered the conditions

intolerable. The entire claim rested on plaintiffs subjective complaints that his work burden was unduly onerous.

The only objective evidence in the record consisted of the management statistical evaluations that he had been working at a level somewhat below his expected capacity as an experienced adjuster while under the Nationwide system, and that his workload was increased to approximately a normal level of capacity for an experienced adjuster under the Allied system. While the work load imposed upon him after the transition might have increased, the undisputed testimony was that it was well within normal limits for an experienced adjuster. While his complaints were loud and repeated, this is not sufficient. It is the working conditions that must be examined, not the complaints. The fact that the conditions changed from that which he enjoyed under the Nationwide model is not sufficient, nor is the fact that his supervisors expected more from him than did his supervisors under the Nationwide system. These are normal transitions in any evolving workplace environment, and are not independently relevant to prove adverse working conditions. The examination has to be focused on the working conditions under the Allied system when objectively compared to working conditions in general, and to the working conditions expected of other employees under the Allied model in particular. Under this examination, the evidence was not sufficient.

The standard is an objective standard - not a subjective one - and no properly deliberative jury should have found that the conditions plaintiff complained of were intolerable when measured against an ordinary employee in the workplace.

V.

The law is clear that an employer may impose conditions of employment on an employee who is a member of a protected class that are disagreeable or distasteful, so long as the actions are connected to a legitimate business purpose. Plaintiff may avoid the consequences of this principle only by showing that the purported business reason for the adverse actions was pretextual. Plaintiffs burden in this event is to demonstrate the existence of pretext by specific evidence. Such cannot be inferred on speculation.

The evidence was overwhelming that Nationwide had a legitimate business reason for the transition of claims handling procedures, for changing plaintiff s job conditions, and for imposing the additional responsibilities on him. The company had a legitimate business reason for the critical evaluations of his performance, and for the remedial steps they were taking to attempt to get plaintiff to perform at a higher level. Any suggestion that the entire transition plan, all of the steps that were taken, and all of the decisions that were made were mere pretext to camouflage the company's intent to get rid of plaintiff is wholly unsupported. The legitimacy of the business plan was thoroughly established in the documents and through the testimony of all of the witnesses, including the plaintiff.

The only suggestion that age considerations were involved consisted of the fragmented statement several witnesses overheard to the effect that Allied was a "young company." These statements were presented in evidence without any context or connection the situation of the plaintiff, and without any rebuttal in the evidence to the explanation offered by the defense witness. Without proof of some linkage between the random statements plaintiff

claims to be "ageist" and the facts of this case, the mere statements, standing alone, are irrelevant.

Proof required to establish pretext must be clear and specific. The possible inferences from the fragmented statement are neither. The fragmented statements, standing alone, are insufficient as a matter of law to support any conclusion that the business reasons stated by defendant for its personnel decisions concerning plaintiff were pretextual.

Without the exception of pretext, the evidence is undisputed that all of the actions taken by the defendant in connection with the plaintiffs employment were based upon legitimate business interests of the defendant. As such, any inference that such acts might be based on prohibited age discrimination is negated as a matter of law.

VII.

The only conclusion that can legitimately be drawn from the evidence presented at trial in this case was that plaintiff was unable to adapt to the changing conditions of the workplace, voluntarily chose to leave his job, and eventually failed to return to work after his lengthy disability leave expired. There is no evidence that any of this was related in any way to the plaintiffs age, and no basis for any inference of such.

The defendant is entitled to a directed verdict as a matter of law, and for these reasons the motion for directed verdict is granted.

Dated December 21, 2007.

/s/ Sr. Judge D. Duff McKee

APPENDIX C

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOE C. WATERMAN, Plaintiff, v. NATIONWIDE MUTUAL INSURANCE COMPANY, et al., Defendants.	Case No. CV OC 04 05906 D JURY VERDICT FOR PLAINTIFF

We the Jury in the above entitled matter find in favor of the Plaintiff Joe C. Waterman and against the Defendant Nationwide Mutual Insurance Company, and assess Plaintiffs damages to be:

$700,000.00

We further answer the Special Interrogatory as follows:

QUESTION: Was the conduct of the defendant Nationwide Mutual Insurance Company in the actions of age

discrimination against the Plaintiff Joe C. Waterman "willful" as defined in the instructions:

ANSWER: Yes [X] No [__]

Dated this 20th day of December, 2006.

/s/ James S. Hall

Foreman of the Jury

Juror No. 1 /s/ Linda Blake	Juror No. 8
Juror No. 2 /s/ Sharon	Juror No. 9
Juror No. 3 /s/ Vicki Gintz	Juror No. 10
Juror No. 4 /s/ Linda Jones	Juror No. 11 /s/ James E. Hall
Juror No. 5 /s/ Cheryl B. Marsh	Juror No. 12 /s/ Jeff E. Berbek
Juror No. 6 /s/ Annette Buck	Juror No. 13
Juror No. 7	Juror No. 14 /s/ Judy Jensen

APPENDIX D

29 U.S.C. § 623.(a)

(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 626(b)(c)

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title [sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended], and subsection (c) of this section. Any act prohibited under section 623 of this title [section 4] shall be deemed to be a prohibited act under section 215 of this title [section 15 of the Fair Labor Standards Act of 1938, as amended]. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of

sections 216 and 217 of this title [sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended]: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts

owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.